UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MISSOURI

In Re: **Patriot Coal Corporation, *et al.*,** **Debtors.**	**Chapter 11** **Cause No. 12-51502-659** **Hon. Kathy A. Surratt-States** **(Jointly Administered)**
Robin Land Company, LLC, **Plaintiff,** **v.** **STB Ventures, Inc., *et al.*,** **Defendants.**	**Adv. Proc. No. 12-04355-659** **Hearing Date:** **April 23, 2013 at 10:00 a.m.** **(prevailing Central Time)** **Hearing Location:** **Courtroom 7 North**

STB VENTURES, INC.'S REPLY TO ROBIN LAND COMPANY, LLC'S OBJECTION TO THE MOTION OF STB VENTURES, INC. UNDER 11 U.S.C. § 365(D)(3) TO (I) COMPEL ROBIN LAND COMPANY, LLC TO PAY PART OR ALL OF THE POST-PETITION AMOUNTS DUE UNDER THE STB OVERRIDE AGREEMENT OR (II), IN THE ALTERNATIVE, TO PROVIDE STB VENTURES, INC. ADEQUATE PROTECTION OF ITS INTERESTS UNDER THE STB OVERRIDE AGREEMENT

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STB VENTURES, INC.'S REPLY TO ROBIN LAND COMPANY, LLC'S OBJECTION TO THE MOTION OF STB VENTURES, INC. UNDER 11 U.S.C. § 365(D)(3) TO (I) COMPEL ROBIN LAND COMPANY, LLC TO PAY PART OR ALL OF THE POST-PETITION AMOUNTS DUE UNDER THE STB OVERRIDE AGREEMENT AND (II), IN THE ALTERNATIVE, TO PROVIDE STB VENTURES, INC. ADEQUATE PROTECTION OF ITS INTERESTS UNDER THE STB OVERRIDE AGREEMENT

Defendant STB Ventures, Inc. ("STB") hereby submits this reply (the "Reply") to the objection (the "Objection") [ECF Doc. No. 55] of Robin Land Company, LLC ("RLC") to the Motion of STB under 11 U.S.C. § 365(d)(3) to (I) compel RLC to pay part or all of the post-petition amounts due under the STB Override Agreement or (II), in the alternative, to provide STB adequate protection of its interests under the STB Override Agreement (the "Motion")[ECF Doc. No. 40]. For brevity's sake, STB incorporates by reference the Statement of Facts in its Motion. Capitalized terms not defined herein have the meanings ascribed to them in the Motion.

I. SUMMARY OF ARGUMENT

RLC has the burden of proving that ***all*** claims made by STB are not obligations under a nonresidential real property lease, ***and until it does so***, RLC must pay amounts due under the STB Override Agreement directly to STB or, in the alternative, into an escrow fund for the benefit of the prevailing party of this proceeding, pending assumption or rejection of the Leases. The underlying policy of this burden is that STB would be unduly prejudiced vis-a-vis other creditors owed obligations under a nonresidential real property lease if RLC converted its case to Chapter 7 or became administratively insolvent because such creditors are currently receiving payment in connection with their respective nonresidential real property leases and STB is not. The current facts and circumstances indicate that RLC's insolvency may be imminent, and for that reason alone, this Court should order RLC to pay the STB Override directly to STB or, at the very least, pay the STB Override into an escrow fund until final resolution of this proceeding.

This Court should order RLC to pay the STB Override pending assumption or rejection of the Leases because the STB Override Agreement is either an integrated, incorporated, or constructive condition of one or both of the Leases. First, the STB Override Agreement is an integrated condition of the Leases because STB and Ark – the original parties to such documents – intended for the STB Override Agreement and the Leases to form a single, unified contract. Second, the STB Override Agreement is an incorporated condition of the Kelly-Hatfield Lease because the owner of the Kelly-Hatfield Premises, Ark KH, commanded RLC's performance under the STB Override Agreement prior to RLC's assumption of portions of the Kelly-Hatfield Lease, and RLC covenanted to Ark KH that it would perform. Third, the STB Override Agreement is a constructive condition of the Leases via constructive trust because RLC (as the partial successor-in-interest of Ark under the Asset Purchase Agreement) has failed to pay full consideration for the Leases.

Therefore, RLC's Objection should be denied, and STB's Motion should be granted.

II. STANDARD OF REVIEW

Under § 365(d)(3), RLC has the burden of proving that the STB Override Agreement need not be paid pending assumption or rejection, ***and until it does so***, RLC must pay amounts due under the STB Override Agreement either to STB directly or into an escrow fund. It is the debtor's burden to persuade a court that the agreements at issue are not required leased terms, and "that burden is not met by mere allegations, even when the allegations are presented in the form of a complaint." *In re Mirant Corp.*, No. 03-46590, 2004 WL 5643668, at *3 (Bankr. N.D. Tex. Sept. 15, 2004).[1] In other words, RLC's burden is to prove that the claim asserted by STB is not an obligation arising under or in connection with a nonresidential real property lease.

[1] *See also In re Stone Barn Manhattan LLC*, 405 B.R. 68, 77-78 (Bankr. S.D.N.Y. 2009)(in dealing with question of whether debtor must pay disputed leases during period in which debtor challenges whether the

Instead, RLC argues generally that it is not subject to this burden because the STB Override Agreement is not a "true lease." *See* RLC's Objection at 18. This argument is misplaced. RLC is subject to the aforementioned burden because the STB Override Agreement is either an integrated, incorporated, or constructive condition of one or both of the Leases.

Fully aware of this burden, RLC assaults this Court and STB with strained legal interpretations in a vain attempt to avoid its proper obligations under § 365(d)(3). The following analysis sheds light on this indisputable fact.

III. ARGUMENT

The current facts and circumstances grant STB the right, under 11 U.S.C. § 365(d)(3), to require RLC to pay the STB Override directly to STB, or into an escrow fund, pending assumption to rejection of the Leases. 11 U.S.C. § 365(d)(3) specifically provides that

> The trustee shall timely perform ***all the obligations*** of the debtor, except those specified in section 365(b)(2), arising from and after the order of relief ***under any unexpired lease of nonresidential real property***, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.

11 U.S.C. § 365(d)(3)(emphasis added); *see also In re Burival*¸ 406 B.R. 548 (Bankr. 8th Cir. 2009), *aff'd,* 613 F.3d 810 (8th Cir. 2010)(stating that § 365(d)(3) obligates a debtor-in-possession to timely perform all post-petition, pre-rejection obligations under an unexpired, nonresidential real property lease on a priority basis as they become due, and the lessor is not required to demonstrate any benefit to the debtor or the estate in order to be entitled to payment). For the reasons stated below, STB has the right to pursue action against RLC pursuant to § 365(d)(3).

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documents at issue are "true leases," court cites favorably to *Elder-Beerman* and *Mirant* decisions as grounds for requiring debtors to make such payments); *In re Tel-Communications, Inc.*, 212 B.R. 342-345-46 (Bankr. W.D.Mo. 1997)(court cites favorably to *Elder-Beerman* decision for principle that lessor's entitlement to payment of rent under lease during pre-assumption period is now automatic).

A. STB has standing to pursue its Motion to Compel because the STB Override Agreement is an integrated, incorporated, or constructive obligation under a nonresidential real property lease.

As an initial matter, STB would like to emphasize that Arch has joined in and adopted the same position of STB in compelling RLC's performance pending assumption or rejection of the Leases. *See generally* Arch's Joinder [CM/ECF Doc. 54]. Considering that Arch owns the Kelly-Hatfield Premises, it is without question that Arch is RLC's landlord and, as such, has standing to pursue an action against RLC under § 365(d)(3). Therefore, RLC's standing argument with regard to the Kelly-Hatfield Lease is moot by Arch's joinder. Notwithstanding Arch's standing with regard to the Kelly-Hatfield Lease, STB and Arch have an independent basis for standing under § 365(d)(3) for the reasons stated below.

Federal courts adhere "to a set of prudential principles that bear on the question of standing." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75, 102 S. Ct. 752, 760, 70 L.Ed.2d 700 (1982). Numbered among these prudential requirements is the "zone of interests" doctrine of particular concern in this case: that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit. *See Bennett v. Spear*, 520 U.S. 154, 162, 117 S. Ct. 1154, 1161, 137 L. Ed. 2d 281 (1997). "Whether a plaintiff's interest is arguably protected by the statute within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question ... but by reference to the particular provision of law upon which the plaintiff relies." *Id.* at 175–76. "Only persons who are given a right of action under a federal statute by Congress have the standing to sue under that statute." *In re Vanguard Airlines, Inc.*, 298 B.R. 626, 634 (Bankr. W.D.Mo. 2003). Here, the statute in question is § 365(d)(3), which states

> . . . [T]he trustee shall timely perform ***all the obligations*** of the debtor . . . arising from and after the order for relief ***under any unexpired lease of nonresidential real property***, until such lease is assumed or rejected.

11 U.S.C. § 365(d)(3) (emphasis added).

Prior to explaining why STB and Arch have standing under § 365(d)(3), it is important to understand RLC's position. Under RLC's dubious interpretation of the prudential standing requirements of § 365(d)(3), STB would have to be, in fact, a lessor. *See* RLC's Objection at 6. This interpretation is contradictory to the prevailing rule of law.

For example, in *In re Three A's Holdings, L.L.C.*, the owners' association charged with enforcing restrictive use covenants for an urban shopping district in which the Chapter 11 debtor's store was located, even though it did not own space which debtor leased, had standing to object to the proposed assumption and assignment of one of the debtor's leases, on the grounds that the proposed assignee intended to conduct business not permitted by the restrictive use covenants. *See* 364 B.R. 550 (D. Del. 2007). Much like the owners' association charged with enforcing restrictive covenants, STB and Arch are third parties that have an interest in the holder of real property performing obligations to which such holder is bound. STB has an interest in RLC performing in accordance with the STB Override Agreement because it will be deprived of substantial royalty income if RLC does not perform. Arch has an interest because it is vicariously liable, pursuant to the Guaranty, for RLC's failure to perform under the STB Override. Accordingly, STB should have standing to compel RLC to make payments in accordance with the STB Override Agreement.

Moreover, in *In re Esmizadeh*, a holder of an alleged equitable leasehold ownership interest in non-residential real property subject to a lease signed by debtor had standing to challenge Chapter 7 trustee's motion to assume and assign lease, even though the holder was not

asserting the landlord's rights, because the holder alleged that the debtor no longer had an interest in the lease, and the granting of trustee's motion would have extinguished the holder's rights. *See* 272 B.R. 377 (E.D.N.Y. 2002). Like the equitable interest holder in *Esmizadeh*, STB asserts that RLC's failure to make payments in accordance with the STB Override Agreement as required under the Asset Purchase Agreement (as Ark's partial successor-in-interest thereto) establishes an unjust enrichment claim for failure of consideration, which gives rise to the imposition of a constructive trust on the leasehold estates created by the Leases until the amounts due under the STB Override Agreement are satisfied. As the beneficiary of an alleged constructive trust, STB must exercise its rights to prevent RLC from assuming the Leases or it will lose its alleged equitable rights with regard to the Leases. If STB prevails on this theory, RLC will have no power to assume or reject the Leases because they will no longer be property of RLC's estate. For this reason, STB has standing to compel RLC to make payments under § 365(d)(3).

Furthermore, in *In re Wingspread Corp.*, a guarantor that had made payments on a lease to the lessor, in lieu of a debtor, was a real party in interest, and by raising an objection to the debtor's assumption of such lease, the guarantor precluded an objection from being waived, even though the lessor did not object to assumption. *See* 116 B.R. 915 (S.D.N.Y. 1990). Like the guarantor in *Wingspread*, Arch has guaranteed RLC's performance of one of the material terms of the Leases and, as such, should have the right to compel performance pending assumption or rejection under § 365(d)(3).

In each of the foregoing examples, the party challenging the debtor's assumption or rejection of a lease pertaining to nonresidential real property was not, in fact, the lessor. Instead, the party challenging the debtor's assumption or rejection of a lease was a third party *that had*

standing to challenge the debtor's assumption or rejection of such a lease because the injury that such third parties could sustain by the debtor's assumption or rejection of a nonresidential real property lease was reasonably related to the nonresidential real property lease. STB is not a lessor, but is a third party whose potential injury is reasonably related to RLC's failure to perform its obligations pending assumption or rejection of a nonresidential real property lease. Therefore, STB has standing to compel RLC's performance under § 365(d)(3) pending assumption or rejection.

B. Without relief under its Motion to Compel, STB will be prejudiced vis-a-vis other creditors because there is a substantial likelihood that RLC will become administrative insolvent or convert to Chapter 7.

Again, under § 365(d)(3), RLC has the burden of proving that the STB Override Agreement need not be paid pending assumption or rejection, and until it does so, RLC must pay amounts due under the STB Override Agreement either to STB directly or into an escrow fund. By requiring debtors to make such payments until the debtors have persuaded the court that the agreements are not entitled to recognition as lease terms under § 365(d)(3), non-debtor parties are protected in the event that the case is converted to Chapter 7 or the estate becomes 'administratively solvent.' *In re Elder-Beerman Stores Corp,* 201 B.R. 759, 764 (Bankr. S.D. Ohio 1996); *see also In re Leisure Time Sports, Inc.,* 189 B.R. 511, 513 (Bankr. S.D. Cal. 1995).

Considering the underlying policy of this rule, STB's Motion is quite timely. RLC's primary source of cash since commencement of this proceeding has been a debtor-in-possession financing facility, (the "DIP Facility"), entered into by its parent corporation, Patriot Coal Corporation, ("Patriot"). *See* PCX Form 10-K for fiscal year 2012 at 9.[2] The DIP Facility

[2] PCX Form 10-K is attached as Exhibit B to the Motion of Aurelius Capital Management, LP, et al. For Entry of an Order, Pursuant to 11 U.S.C. §§ 105(a) and 1104(a), Directing the Appointment of a Chapter 11 Trustee. [CM/ECF Doc. No. 3423 in *In re Patriot Coal*, Case No. 12-51502-659].

contains a number of financial covenants applicable to Patriot and its subsidiaries, including requirements relating to minimum consolidated EBITDA, maximum capital expenditures, and minimum liquidity. *Id*. at 34. A breach of those covenants would "give the [DIP Facility] lenders the right to terminate their lending commitments," to "declare all loans, all interest thereon and all other obligations under the [DIP Facility] due and payable," and to "exercise other remedies available to them." *Id*. at 33-34.

Since this proceeding was commenced, Patriot has been hemorrhaging cash. Patriot's average revenue for the first two months of 2013 decreased by $40 million as compared to the monthly averages of the second half of 2012 -- a staggering 27% decline.[3] Simultaneously, Patriot's monthly operating costs have only fallen by $18 million (a 13% decline). The combined effect reduced Patriot's operating margins from 4.2% in the second half of 2012 to -14.6% in the first two months of 2013. This gap between revenues and expenses is quickly eliminating Patriot's (and RLC's) liquidity.

Patriot (and RLC) don't deny this. Indeed, they have openly admitted that "there is a substantial likelihood that [they] may not comply with the [DIP Facility's] minimum consolidated EBITDA financial covenant beginning in the third quarter of 2013." *Id.* at 34. They have also admitted that, if that happens, they "may not have sufficient cash availability to meet [their] operating needs or satisfy [their] obligations as they become due, in which instance [they] could be required . . . to convert the Bankruptcy Case into a liquidation under Chapter 7 of the Bankruptcy Code." *Id*.

If this Court refrains from ordering RLC to, at the very least, pay the STB Override into an escrow fund pending a final resolution of this proceeding, STB would subjected to an

[3] The statistics included in this paragraph are derived from Patriot's consolidated "Monthly Operating Reports."

inordinate amount of risk in relation to other creditors owed obligations under nonresidential real property leases. For this reason alone, this Court should order RLC to pay the STB Override directly, or into an escrow fund, before the financial "train wreck" that RLC predicts actually occurs.

C. STB has a right to require RLC to pay the STB Override pending assumption or rejection of Leases because the STB Override Agreement is integrated condition of the Leases.

The STB Override Agreement is integrated with the Leases because the facts and circumstances surrounding their creation indicate that the parties to those agreements intended for them to be integrated.[4] Pursuant to § 365(d)(3), a debtor is obligated to pay obligations identified in documents or agreements that are integrated[5] with a nonresidential real property lease. *See In re Integrated Health Services,* No. 00-389, 2000 WL 33712484 at *2 (Bankr. D. Del. July 7, 2000). Under West Virginia law, the determination of whether two separate contracts are integrated into a single unified agreement is a question of the contracting parties' intent as expressed in the language and subject matter of the agreement. *See Amherst Land Co., Corp. v. United Fuel Gas Co.*, 85 S.E.2d 225, 229 (W. Va. 1954). STB has provided substantial amounts of information and analysis indicating that the STB Override Agreement, among other

[4] *See* STB's Motion at 22-27.

[5] Whether the rights and obligations under multiple instruments are deemed a single contract for purposes of § 365 of the Bankruptcy Code turns on the state law that governs such instruments. *See, e.g., In re Adelphia Bus. Solutions, Inc.*, 322 B.R. 51, 54 (Bankr. S.D.N.Y. 2005)(applying Missouri law to determine severability of leases that contained Missouri choice-of-law provisions); *In re S.E. Nichols, Inc.*, 120 B.R. 745, 748 (Bankr. S.D.N.Y. 1990)("For purposes of Section 365, interpretation of the legal status of lease agreements is governed by state law."). Here, the Kelly-Hatfield Lease, the Lawson Heirs Lease and the STB Asset Purchase Agreement all contain express choice of law provisions indicating that West Virginia law governs such instruments. The STB Override Agreement does not have an express choice of law clause, but does pertain to realty contained within the boundaries of the State of West Virginia. Thus, West Virginia law applies with regard to the integration of the STB Override Agreement with the Leases.

documents involved in the STB Transaction, is integrated with the Leases,[6] *inter alia*, (i) all three documents were executed on the same day, (ii) the STB Override Agreement served as "additional consideration" for STB's release of the same leasehold premises encompassed by the Leases, (iii) the STB Override Agreement expressly references the Asset Purchase Agreement, and (iv) the Asset Purchase Agreement references the STB Override Agreement. Thus, pursuant to the principles established by *Integrated Health*, RLC should assume the STB Override Agreement and the Leases *cum onere*, or reject all of said documents *in toto*.

In an effort to avoid its legal duty, RLC argues that the STB Override Agreement is not integrated with the Leases because (1) a breach of the STB Override Agreement does not constitute a breach of one or both of the Leases, and (2) the STB Override Agreement and Leases involve separate parties. Neither theory is credible.

As previously mentioned, RLC claims that the STB Override Agreement is not integrated with the Leases because a breach of it does not constitute a breach of one or both of the Leases. *See* RLC's Objection at 14 (citing *Elliot v. Richter*, 496 S.W.2d 860, 864 (Mo. 1973) in support of this proposition). RLC argues that *Elliot* may be applied to the facts of this case because the rule stated in *Elliot* does not materially differ from West Virginia law.[7] However, RLC fails to apply the general rule established by *Elliot*, which is two separate instruments shall be deemed to constitute one single, unified contract if the parties of those instruments intended for such instruments to be integrated. *See id.* at 864. Thus, RLC's application of *Elliot* to the facts of this case is incorrect.

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[6] For brevity's sake, STB has not reiterated the analysis provided by it in its Motion regarding the integration of the STB Override Agreement and the Leases. However, STB hereby incorporates such analysis in this Reply. For further information, please see STB's Motion at 22-27.

[7] For the reasons discussed in footnote 3, *supra*, West Virginia law is the most appropriate law to utilize in gleaning whether the STB Override Agreement and the Leases are, at law, integrated.

Under West Virginia law, the determination of whether two separate contracts are integrated into a single unified agreement is a question of the contracting parties' intent as expressed in the language and subject matter of the agreement. *See Amherst Land Co., Corp. v. United Fuel Gas Co.*, 85 S.E.2d at 229. For example, "even though writings may be separate, they will be construed together and considered to constitute one transaction when the parties are the same, the subject matter is the same and the relationship between the documents is clearly apparent." *Ashland Oil, Inc. v. Donahue*, 223 S.E.2d 433, 437 (W. Va. 1976). Thus, *Amherst* and its progeny utilize a much more flexible rule based on the totality of the circumstances. Indeed, the totality of the circumstances of this case indicates that the STB Override is integrated with the Leases. For those reasons, STB posits that the STB Override is integrated with the Leases notwithstanding the fact that a breach of the STB Override Agreement may or may not cause a breach under one or both of the Leases.

RLC further argues that "it is 'illogical' to treat agreements between separate parties – like the STB Override [Agreement], on the one hand, and the Leases, on the other hand – as a single contract."[8] *See* RLC's Objection at 16 (citing *Byrd v. Gardinier, Inc. (In re Gardinier, Inc.)*, 831 F.2d 974, 978 (11th Cir. 1987) in support of its argument). However, many courts have found contracts to be integrated where they involved separate parties. *See, e.g., Aspenwood Inv. Co. v. Martinez*, 355 F.3d 1256, 1260 (10th Cir. 2004)(holding that three documents were integrated and that HUD was bound by terms of promissory note even when it was not a party to it); *Patterson-Ballagh Corp. v. Byron Jackson Co.*, 145 F.2d 786, 787-89 (9th Cir. 1944)(holding that four contracts entered at same time and part of same transaction had to be considered together, although only two were signed by the appellant and appellee); *Commander Oil Corp v. Advance Food Serv. Equip.*, 991 F.2d 49, 53 (2d Cir. 1993)(non-contemporaneous Asset

[8] *See* RLC's Objection at 16.

Purchase Agreement and lease had to be taken as one agreement where parties assented to all promises as a whole, so that there would have been no bargain if any promise or set of promises had been stricken). Moreover, RLC is yet again attempting to apply a "bright line" rule instead of evaluating the intent of the parties.

In *Gardinier*, the court was confronted with the question as to "whether an agreement to pay a brokerage commission, contained within the same document as a purchase and sale agreement, is a separate and distinct contract from the purchase and sale agreement." 831 F.2d at 974. Like in *Amherst*, the court noted that the parties' intention was the governing principle in deciding whether the brokerage agreement and the purchase and sale agreement were one indivisible contract or were two separate contracts. *Id.* at 976. The court also noted that the parties' intention could be discovered by examining the nature and purpose of the agreements, the consideration for the agreements, and the interrelation of the obligations set forth in the agreements. *Id.* After evaluating the aforementioned factors, the Court concluded that the brokerage agreement was separate and apart from the purchase and sale agreement. *Id.* at 975.

Here, the facts of this case are distinguishable. As an initial matter, STB would like to emphasize that the STB Override Agreement provides no consideration to RLC. Unlike the seller, buyer, or broker in *Gardinier*, RLC was not receiving anything in return for promising to perform under the STB Override Agreement. No sophisticated coal mining enterprise, such as RLC and its affiliates, would have assumed an obligation as large as the STB Override without receiving something in return. Coincidentally, at the same time that RLC assumed obligations under the STB Override Agreement, it assumed obligations under the Lawson Heirs Lease and the Kelly-Hatfield Lease and, in exchange for the assumption of those liabilities, RLC was granted the right to mine coal on, in, and/or under the Lawson Heirs Lease and on, in, and/or

under portions of the Kelly-Hatfield Lease. These facts alone essentially provide conclusive proof that the STB Override Agreement and the Leases are integrated, and an examination of the facts and circumstances under the auspices of *Gardinier* is no different.

First, the nature and purpose of the STB Override Agreement and the Leases are substantially similar, if not identical. As previously mentioned, Ark (RLC's predecessor-in-interest) obtained possession of the Leases by entering into the Asset Purchase Agreement. One of the conditions precedent to the Asset Purchase Agreement was Ark's execution, delivery, and performance under the STB Override Agreement. Therefore, the nature and purpose of the STB Override Agreement is to grant Ark (and now RLC as Ark's partial successor-in-interest) the right to mine coal on the Premises.

The Leases serve the same purpose. Paragraph 1 of the Kelly-Hatfield Lease states "[s]ubject to the reservations, exceptions and other terms and conditions contained herein, Lessor does ***hereby let, lease and demise*** exclusively unto Lessee, its successors and assigns, ***all of Lessor's right, title and interest in and to all of the mineable and merchantable coal***, together with all appurtenant mining rights, owned by Lessor and encompassed by the [Kelly-Hatfield Lease Premises]" Paragraph 1 of the Lawson Heirs Lease states "Lessor does ***hereby let, lease and demise*** exclusively unto Lessee, its successors and assigns, ***all of Lessor's right, title and interest in and to all of the coal***, located in and underlying approximately 1,627.563 acres located in Logan County, West Virginia as more particularly described in Exhibit A, attached hereto and made a part hereof, toether with any reversionary rights or after acquired rights therein." Because the Leases and the STB Override Agreement generally serve the same purpose, this first *Gardinier* factor tilts in STB's favor.

Second, the consideration given for the STB Override Agreement and the Leases are substantially similar, if not the same. All three agreements were executed and delivered in connection with the Asset Purchase Agreement. Ark (RLC's partial predecessor-in-interest) executed and delivered the STB Override Agreement as "additional consideration" for STB's agreement to assign the Leases. The Leases were assigned by STB to Ark as consideration for Ark's delivery of a certain lump sum payment, execution and delivery of the STB Override Agreement, and the assumption by Ark of certain liabilities. Accordingly, without the existence of the Asset Purchase Agreement, the STB Override Agreement and the Leases would not have come into being. Therefore, the consideration for all three documents is interrelated, if not identical.

Third, the obligations of the parties under the STB Override Agreement and the Leases are interrelated. As already mentioned, Ark (and RLC as Ark's partial successor-in-interest) is obligated to pay to STB an overriding royalty on all sales of coal to third parties for each ton of 2,000 pounds of coal mined and sold from the Leased Premises equal to one and one-half percent of Gross Sales Price. This obligation continues for a period coextensive with the primary term, and any extension or renewal thereof, of the Leases, or until the exhaustion of all mineable and merchantable coal. In other words, the obligation to pay the STB Override is dependent upon the term of the Leases, or until exhaustion of all mineable and merchantable coal from the Leased Premises, whichever is the latter. Similarly, Ark (and RLC as Ark's partial successor-in-interest) is obligated to pay royalties to the lessor under the Kelly-Hatfield Lease for the term of the Kelly-Hatfield Lease, or until exhaustion of all mineable and merchantable coal. Ark (and RLC as Ark's total successor-in-interest) is also obligated to pay royalties to the lessor under the Lawson Heirs Lease for the term of the Lawson Heirs Lease, or until exhaustion of all mineable

and merchantable coal. For the foregoing reasons, it is apparent that the obligations of Ark (and RLC as Ark's partial or total successor-in-interest) to the lessors of the Leases are interrelated with the obligations of Ark (and RLC as Ark's partial or total successor-in-interest) to STB under the STB Override Agreement.

Moreover, unlike the broker in *Gardinier*, who had no control over the title of the subject property to which his commission was derived, here, STB was the lawful holder of unexpired leases on the Leasehold Premises, and without STB's willingness to part with those leasehold interests, Ark (and RLC as the partial or total successor-in-interest) would not have had the opportunity to obtain the Leases from the owners of the Leasehold Premises.

Therefore, pursuant to the principles of *Gardinier*, the STB Override Agreement and the Leases should be viewed as a single, unified contract because the nature and purpose, the consideration, and obligations set forth in the respective agreements are interrelated.

D. STB has a right to require RLC to pay the STB Override pending assumption or rejection of the Kelly-Hatfield Lease because the STB Override Agreement is an incorporated condition of the Kelly-Hatfield Lease.

For the reasons stated in STB's Motion,[9] the STB Override is an incorporated condition of the Kelly-Hatfield Lease. The obligation imposed upon the debtor by § 365(d)(3) includes not only payment of rent, but also payment of any other charges, ***which are incorporated conditions of a nonresidential real property lease***. *See, e.g. In re Full House Foods, Inc.*, 279 B.R. 71, 74-79 (Bankr. S.D.N.Y. 2002)(holding that note payments, classified in the debtor's sublease as "additional rent," were obligations owed by debtor to the sublessor pursuant to § 365(d)(3)).[10]

[9] *See* STB's Motion at 15-21.

[10] *In re Goody's Family Clothing,* 443 B.R. 5, 12-13 (Bankr. D. Del. 2010)(debtor lessee was required by terms of lease and § 365(d)(3) to pay property taxes that came due post-petition and pre-rejection "directly to the relevant taxing authority"); *In re Bachrach Clothing, Inc.*, 396 B.R. 219, 220-21 (N.D. Ill. 2008)(reaching the same conclusion); *In re Garden Ridge Corp.*, 321 B.R. 669, 677-78 (Bankr. D. Del.

Notwithstanding the clarity of this issue, RLC claims that it is "well-settled that "[a]n assignment does not modify the terms of the underlying contract.'" *See* RLC's Objection at 11 (citing *Citibank v. Tele/Resources, Inc.*, 724 F.2d 266, 269 (2d Cir. 1983) in support of its claim).[11] In a similar vein, RLC also claims that the parties to the assignment did not have the requisite power to modify the terms of the Kelly-Hatfield Lease. *See id.* Finally, as a backstop, RLC argues that an agreement granting royalties can never be considered a covenant running with the land under West Virginia law. *See id.* at 13 (citing *McIntosh v. Vail*, 28 S.E.2d 607 (W. Va. 1943) in support of argument).

What is misleading about all of these arguments is that a non-landlord assignor may actually impose additional conditions upon an assignee in connection with an assignment of real property, provided that the landlord consents to such additional burden. *See Easley Coal Co. v. Brush Creek Coal Co.*, 112 S.E. 512, 515 (W. Va. 1922)(stating that Easley Coal Company owed 12 cents per ton in royalty because the assignment it received from Brush Creek Coal Company, its predecessor-in-interest, required a royalty of 9 cents to go to the lessor and 3 cents to go to Brush Creek's assignor). This rule stems from the bedrock principle that a covenant runs with the land when (1) there is a privity of estate between the owner and possessor, (2) the benefit and burden of said covenant "touches and concerns" the respective estates of the owner and the possessor, and (3) the intent of the parties was for the covenant to run with the land. *See McIntosh*, 28 S.E.2d at 609-10. As RLC concedes in its Objection, West Virginia is "committed

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2005)(holding that payment of taxes was a post-petition obligation of the debtor lessee's under § 365(d)(3) where debtor was required by lease to pay real property taxes to taxing authority by certain date and to provide proof of payment to landlord by another date, and both dates were after bankruptcy petition was filed).

[11] Again, RLC resorts to citing law from a jurisdiction which should not apply in this proceeding according to applicable conflicts-of-laws principles. The contracts in question have provisions requiring that they shall be governed by and construed in accordance with the laws of the State of West Virginia. Therefore, West Virginia law should be utilized in reaching a conclusion on this matter.

to the doctrine that, except as between landlord and tenant, no burden can be imposed on land by a grantor's covenant so as to bind a subsequent grantee of the covenantor." *Id.* at 613. With this accurate portrayal of West Virginia law in mind, STB addresses each of RLC's arguments below.

The Amended and Restated Partial Assignment and Assumption of Lease dated May 22, 2007 (the "2007 Assignment and Assumption") was not just an ordinary assignment. The 2007 Assignment and Assumption was executed by (i) RLC, as the assignee, (ii) Ark, as the assignor, and, most importantly, (iii) Ark KH, as the landlord. When RLC joined in the execution of the 2007 Assignment and Assumption, RLC acknowledged that Ark KH was the owner of the Kelly-Hatfield Premises and covenanted to Ark KH that it would assume the obligations of the Kelly-Hatfield Lease and pay the STB Override insofar as those obligations applied to the portions of the Kelly-Hatfield Premises assigned by Ark to RLC in 2005 and 2007. Thus, a privity of estate existed between the owner of the property, Ark KH, and the assignee, RLC.

The benefit and burden of RLC's covenant to pay the STB Override also "touches and concerns" the respective estates of Ark KH and RLC because RLC's liability under the STB Override is not triggered until RLC mines coal on, in, and/or under the Kelly-Hatfield Premises.

Finally, the parties intended for the covenant to run with the Kelly-Hatfield Lease for several reasons. First, the only consideration given by RLC for the aforementioned assignment was the assumption of liability under the Kelly-Hatfield Lease and under the STB Override Agreement insofar as they applied to the portions assigned by the 2007 Assignment and Assumption and the 2005 Initial Partial Assignment. Second, Ark KH only consented to the 2007 Assignment and Assumption "as provided [subject to the conditions] herein." Third, Ark

only made the 2007 Assignment and Assumption subject to RLC's agreement to pay the STB Override for its term. Thus, the intent of the parties was for the covenant to run with the land.

Therefore, the 2007 Assignment and Assumption created a covenant running with the Kelly-Hatfield Lease and, accordingly, payment of the STB Override is an incorporated condition of the Kelly-Hatfield Lease that must be assumed *cum onere* with the Kelly-Hatfield Lease, or rejected with the Kelly-Hatfield Lease *in toto*.

E. STB has a right to require RLC to pay the STB Override pending assumption or rejection of the Leases because a constructive trust holds title to the Leases until the payments under the STB Override Agreement are satisfied in full.

Before a bankruptcy court may allow a debtor to assume or reject a lease that is subject to an equitable interest, such court must determine, as of the time of such assumption or rejection, that such lease is part of the debtor's estate. *See In re Esmizadeh,* 272 B.R. 377, 384 (E.D.N.Y 2002). Under West Virginia law, a court will find an unjust enrichment claim to be valid "whenever the legal title to property . . . has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weaknesses or necessities, or through any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest." *Gariety v. Vorono,* 261 Fed. Appx. 456, 460 (4th Cir. 2008); *Annon v. Lucas*, 155 W. Va. 368, 185 S.E.2d 343, 352 (W. Va. 1971); *see also Patterson v. Patterson,* 167 W. Va. 1, 277 S.E.2d 709, 715 (W. Va. 1981); *Thompson v. Merchants' & Mechanics' Bank of Wheeling*, 3 W. Va. 651 (W. Va. 1869).[12]

[12] One example of a circumstance where it would be unconscientious for the holder of the legal title to retain and enjoy the beneficial interest would be a breach of a land sales contract for failure of consideration. *See* Andrew Burrows, The Law of Restitution 21 (1993).

As a debtor-in-possession, RLC seeks for this Court to declare the STB Override Agreement as severable and independent from the Asset Purchase Agreement, so that it may reject the STB Override Agreement, and retain the Kelly-Hatfield Leasehold and the Lawson Heirs Leasehold without the additional cost of the STB Override. If this Court adopts RLC's theory, the creditors of RLC will receive the benefit of RLC owning the Kelly-Hatfield Leasehold and the Lawson Heirs Leasehold without RLC (as Ark's successor-in-interest) rendering full payment for them pursuant to the Asset Purchase Agreement. To allow such an event to occur is an injustice in every sense of the word and, accordingly, STB requests that this court exercise its equitable powers to prevent it from happening.

One remedy available to a court addressing a claim for unjust enrichment claim is a constructive trust. *See In re Obrien*, 414 B.R. 92, 99 (S. D. W. Va. 2009)(quoting *Timberlake v. Heflin*, 180 W. Va. 644, 379 S.E.2d 149, 155 (W. Va. 1989)). In instances where the imposition of a constructive trust is proper, if a constructive trustee sells the trust property, the grantee, if he has notice of the trust, or the facts giving rise to the trust, becomes a constructive trustee and holds the legal title subject to the rights of the beneficiaries. *See Newman v. Newman*, 60 W. Va. 371, 55 S.E. 377 (1906); *Pan Coal Co. v. Garland Pocahontas Coal Co.*, 97 W. Va. 368, 125 S.E. 226 (1924).

Here, as previously mentioned, Ark gained possession of the Kelly-Hatfield Lease and the Lawson Heirs Lease by agreeing to pay STB the STB Override as "additional consideration" pursuant to the terms of the Asset Purchase Agreement. Ark then assigned all of its interests in the Lawson Heirs Leasehold, a significant part of the Kelly-Hatfield Leasehold, the Asset Purchase Agreement, and the STB Override Agreement, to RLC in 2005. During the negotiations of those transactions, RLC was notified that some obligations under the Asset

Purchase Agreement had not yet been satisfied, i.e. payment of the STB Override as additional consideration. This fact is corroborated by the fact that the 2005 Initial Partial Assignment expressly references the STB Override Agreement and RLC expressly assumed the STB Override Agreement by the same Agreement. Moreover, RLC subsequently ratified the STB Override Agreement's incorporation into the Kelly-Hatfield Leasehold when it expressly agreed to pay the STB Override under the 2007 Assignment and Assumption. Thus, RLC had notice of the pending obligations owed to STB under the Asset Purchase Agreement and the STB Override Agreement. As such, RLC is a resulting constructive trustee (post-assignment from Ark) of the constructive trust holding title of the Kelly-Hatfield Leasehold and the Lawson Heirs Leasehold for the benefit of STB.

Because RLC could be deemed a constructive trustee upon a final resolution of this proceeding, it was incumbent upon STB to move this Court to compel RLC to pay the STB Override or it could potentially lose its rights to the Leases. Accordingly, this Court should stay any assumption or rejection of the Lawson Heirs Lease and the Kelly-Hatfield Lease, and order RLC to pay the STB Override directly to STB, or into an escrow fund, pending a final resolution of the case.

IV. CONCLUSION

For the foregoing reasons, STB respectfully requests that this Court:

1. order RLC to make all payments due under the STB Override Agreement (post-petition) directly to STB or, in the alternative, into an escrow pending resolution of this adversary proceeding, with the condition that if STB prevails in this adversary proceeding it is enabled to the funds and if RLC prevails it is entitled to a return of the escrow funds;

2. stay any assumption or rejection of the Lawson Heirs Lease and the Kelly-Hatfield Lease until final resolution of this proceeding; and

3. grant such other relief as this Court deems to be just and applicable under the given circumstances.

Dated: April 8, 2013

Respectfully submitted,

By: */s/ Joseph G. Bunn*

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UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MISSOURI

In Re: **Patriot Coal Corporation, *et al.*,** **Debtors.**	**Chapter 11** **Cause No. 12-51502-659** **Hon. Kathy A. Surratt-States** **(Jointly Administered)**
Robin Land Company, LLC, **Plaintiff,** **v.** **STB Ventures, Inc., *et al.*,** **Defendants.**	**Adv. Proc. No. 12-04355-659** **Hearing Date:** **April 23, 2013 at 10:00 a.m.** **(prevailing Central Time)** **Hearing Location:** **Courtroom 7 North**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of April, 2013, a true and correct copy of ***STB Ventures, Inc.'s Reply to Robin Land Company, LLC's objection to the motion of STB Ventures, Inc. under 11 U.S.C. § 365(d)(3) to (I) compel Robin Land Company, LLC to pay part or all of the post-petition amounts due under the STB Override Agreement, and (II), in the alternative, to provide STB Ventures, Inc. adequate protection of its interests under the STB Override Agreement*** was served via CM/ECF notification on all parties receiving such notification.

By: */s/ Joseph G. Bunn*

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